the list, and must be addressed if Wayne County is to be competitive with other regions and the world market.

II

RESPONDENTS LACK STANDING TO CHALLENGE OHIO'S TAX CREDIT STATUTE BECAUSE RESPONDENTS' INJURIES ARE CONJECTURAL AND NOT LIKELY TO BE REDRESSED BY A FAVORABLE DECISION

The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. *Kowalski v. Tesmer*, 543 U.S. 125, ___, 125 S. Ct. 564, 567 (2004). The party invoking federal jurisdiction bears the burden of establishing that jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, since Respondents here invoked the jurisdiction of this Court, Respondents bear the burden of establishing that they have standing. *Id.*

A. Respondents Lack Article III Standing

This Court has held that the "irreducible constitutional minimum" of standing contains three elements:

1. "Injury in fact" of a legally protected interest that is, concrete and particularized, actual or imminent, and not conjectural or hypothetical;

2. A causal connection between the injury and the challenged action, an injury which is not the result of the independent action of a third party; and

3. An injury that will likely, not speculatively, be redressed by a favorable decision of the court. U.S. Const. art. III, § 1. *Lujan*, 504 U.S. at 560-561.

Here, Respondents cannot establish any of these required elements. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Comp. ¶¶ 2-6. The Ohio Respondents allege that, as a result of the tax credit, the revenues of their state have diminished and that the tax credit impermissibly and disproportionately shifts the tax burden to them. Comp. ¶¶ 22, 40, 42.

In a similar case, this Court refused to confer standing on state taxpayers, who alleged that a state statute governing mineral leases "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." This Court held that the taxpayers lacked standing because "even if the first part of the assertion were correct . . . it is pure speculation whether the lawsuit would result in any actual tax relief for respondents." *ASARCO v. Kadish*, 490 U.S. 605, 613, 614 (1989).

This Court went on to say, "[t]he possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is 'remote, fluctuating and uncertain' . . . and consequently the claimed injury is not 'likely to be redressed by a favorable decision.'" *Id.*

Like the taxpayers in *ASARCO*, the Ohio taxpayers, in the case before the Court today, lack standing because their lawsuit rests on conjecture and their claimed injury would not likely be redressed by a favorable decision. *Id.* Similarly, the Michigan Respondents' lawsuit rests on even greater speculation: that they lost "economic opportunity in the form of jobs" because of the Ohio tax credit. Comp.

¶ 42. The Michigan Respondents speculate that, had DaimlerChrysler not expanded in Ohio, it would have expanded in Michigan and given Respondents a chance at jobs. That speculation does not even come close to an "injury in fact," caused by the challenged tax credit, which would likely be redressed by a favorable decision.

B. Respondents Lack Standing To Raise The Rights Of Others

An alternative threshold question of standing asks if Respondents have standing to raise the rights of others. *Kowalski*, 125 S. Ct. at 567. A party seeking third-party standing must show: first, that the party asserting the right has a "close" relationship with the person who possesses the right; and, second, that there is a "hindrance" to the possessor's ability to protect his own interest. *Id.* Here, Respondents have alleged no such cause of action or no such relationship.

Further, the right to complain that a state law discriminates in violation of the Commerce Clause belongs to those against whom the law discriminates. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n. 3 (1977). Here, Respondents lack third-party standing because they do not allege that the tax credit discriminates against them. *Id.*

III

THE SIXTH CIRCUIT HAS MISAPPLIED LONGSTANDING PRECEDENT IN THE AREA OF INTERSTATE COMMERCE, AS THE TAX INCENTIVES PROVIDED BY OHIO, AND BY JURISDICTIONS LIKE WAYNE COUNTY DO NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE, IN VIOLATION OF THE DORMANT COMMERCE CLAUSE

This Court has held that under the Federal Economic Clause, a state (and by extension a political subdivision thereof such as Wayne County) may enact its own philosophy towards business taxation. *Id.* In *Boston Stock Exchange,* this Court explained that, "Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a state may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no state may discriminatorily tax the products manufactured or the business operations performed in any other state." *Id.* at 336-337.

In *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), Justice Robert Jackson articulated the Court's position on state regulation and the national economy. For the Court, he wrote, "The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action. [Perhaps] even

more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the [Constitution]."

The "great silence" created by the Founding Fathers in the Commerce Clause, has long meant that the states, and municipalities like Wayne County, have great freedom to enact economic programs to benefit businesses within its boundaries, where Congress has not "spoken" in some pre-emptive fashion, so long as the economic program does not affirmatively discriminate against foreign corporations. This great silence has come to be known as the Dormant Commerce Clause theory.

The "Dormant Commerce Clause" theory has been used to strike down undue burdens on interstate commerce. But such a burden was not found in *Boston Stock Exchange* where tax incentives for intrastate benefits was applied.

In the case before the Court today, the Sixth Circuit cited *Boston Stock Exchange* but misapplied it by holding that Ohio's tax incentive was discriminatory.

On the contrary, Ohio, like Wayne County, and like other jurisdictions throughout the country, is constitutionally permitted to provide such tax incentives to businesses within its borders because it has not imposed a tax burden on products or business operations on a company in another state. Taxing discrimination in this sense would require some steps to actively hinder a company or product line in another state, while creating the intrastate advantage, and there is no evidence of that type of undue tax burden on out-of-state businesses in this case.

Significantly, the Sixth Circuit's decision is expressly contrary to the leading state law case in the Sixth Circuit, decided by the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W. 2d 182 (Mich. 1992). In the *Caterpillar* case, the Michigan Department of Treasury extended a capital acquisition deduction to Caterpillar and other qualifying businesses for personal property located within the state. Under this Michigan economic program, even if the business applying for the tax deduction was headquartered in another state, the company's personal property located in Michigan triggered the benefit. *Id.* at 186.

The Michigan Supreme Court considered, with detailed care, the precedents of this court, explaining that the Michigan tax incentive program at issue was proper in its promotion of intrastate commerce, while at the same time, not being a discriminatory burden on interstate commerce. *Id.* at 192.

Caterpillar is consistent with this Court's rulings in *Boston Stock Exchange*, and other decisions cited herein. It is entirely consistent with the tax incentive offered by the state of Ohio to Petitioner DaimlerChrysler, and it is consistent with the economic development and tax incentive priorities of Wayne County.

Making Wayne County more business friendly, is not illegal under the Dormant Commerce Clause. Businesses that want to come into Wayne County from other counties or states or countries, for that matter, have the equal right to apply for these tax incentives.

CONCLUSION

The Constitution sets forth, and rests upon, innovative principles original to the American experience such as federalism and a proven balance in political mechanisms through separation of powers. *Roper v. Simmons*, 543 U.S. 551, ___, 125 S. Ct. 1183, 1200 (2005).

Respondents' remedy lies in using those political mechanisms to change the laws that Respondents disagree with. Respondents' remedy does not lie in the courts.

RELIEF REQUESTED

Wayne County respectfully requests that this Court reverse the decision of the Sixth Circuit.

Respectfully submitted,

EDWARD M. THOMAS
MELVIN BUTCH HOLLOWELL

December 5, 2005